Section 16 of the Standard Terms sets forth the grievance procedure, but also provides:

> The foregoing procedure shall be without prejudice to other modes of voluntary settlement of disputes and to the jurisdiction of the Philippine Overseas Employment Administration (POEA) or the National Labor Relations Commission (NLRC) over any unresolved complaints arising out of shipboard employment that **shall** be brought before it by the seafarer.

(emphasis added). The forum selection clause provides:

> SECTION 29. DISPUTE SETTLEMENT PROCEDURES
>
> In cases of claims and disputes **arising from this employment**, the parties covered by a collective bargaining agreement shall submit the claim or dispute to the original and exclusive jurisdiction of the voluntary arbitrator or panel of arbitrators. **If the parties are not covered by a collective bargaining agreement, the parties may at their option submit the claim or dispute to either the original and exclusive jurisdiction of the National Labor Relations Commission (NLRC), pursuant to Republic Act (RA) 8042 otherwise known as the Migrant Workers and Overseas Filipinos Act of 1995 or to the original and exclusive jurisdiction of the voluntary arbitrator or panel of arbitrators.**

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> The Philippine Overseas Employment Administration (POEA) **shall exercise original and exclusive jurisdiction** to hear and decide disciplinary action on cases, which are administrative in character, involving or **arising out of violations of recruitment laws, rules and regulations involving employers, principals, contracting partners and Filipino seafarers.**

(emphasis added).

The Standard Terms incorporated into the international contracts at issue specifically reference the MWOFA,[1] also known as Republic Act 8042, which also provides for the NLRC's exclusive jurisdiction to hear any "claims arising out of an employer-employee relationship **by virtue of any law or contract** involving Filipino workers." MWOFA, Section 10. The NLRC has the exclusive jurisdiction to hear any such claim, "including claims for actual, moral, exemplary and other forms of damages." Id. Petitioners' claims in this case fall within the exclusive jurisdiction of the NLRC under the international agreements at issue and MWOFA.

Petitioners instituted this action in the United States District Court for the Eastern District of Louisiana on July 11, 2002, pursuant to the Fair Labor Standards Act, 29 U.S.C. § 201, *et. seq.* Under 29 U.S.C. § 216(b), more than 100 Filipino seafarers have consented to join this action. OSFI filed a Motion to Dismiss for Improper Venue Under Rule 12(b)(3) and Lack of Subject Matter Jurisdiction Under Rule 12(b)(1) on November 14, 2002, based on the international arbitration agreements signed by Petitioners. The District

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[1] The Migrant Workers and Overseas Filipino Act of 1995.

Court denied the motion in an Order entered January 28, 2003, but granted in part OSFI's Motion for Rehearing or Alternative Relief on February 11, 2003. Specifically, the District Court certified for interlocutory appeal to the Fifth Circuit under 28 U.S.C. § 1292(b) issues concerning the enforceability of the international arbitration agreements at issue. The Fifth Circuit reversed the District Court's denial of OSFI's Motion to Dismiss, and Petitioners now seek discretionary review of that decision from this Court. *Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898 (5th Cir. 2005).[2]

REASONS FOR DENYING THE PETITION

1. The Court Should Deny This Petition as in *Francisco v. STOLT ACHIEVEMENT*, 293 F.3d 270, 271-72 (5th Cir. 2002), *cert. denied*, 537 U.S. 1030, 123 S.Ct. 561, 154 L.Ed.2d 445, and *Bautista v. Star Cruises*, 396 F.3d 1289 (11th Cir. 2005), *cert. denied*, 125 S.Ct. 2954, Both of Which Involved the Same Issue

The Petitioners have presented no compelling reason, as required by Rule 10, for this Court to exercise its

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[2] In accordance with the Fifth Circuit's decision, the District Court entered a final judgment dismissing this action for improper venue on May 5, 2005. Petitioners filed a Motion for Reconsideration, which the District Court denied, although it consolidated *Lim* with a related action involving identical claims against Respondent by another group of Filipino seafarers and also dismissed that action for improper venue on June 22, 2005. *Balbin v. Offshore Specialty Fabricators, Inc.*, Civil Action No. 04-866, Section J, United States District Court, Eastern District of Louisiana.

discretionary review of the Fifth Circuit's decision. In fact, this Court twice has declined to review decisions from different federal appeals courts involving the same issue. *Francisco v. STOLT ACHIEVEMENT*, 293 F.3d 270, 271-72 (5th Cir. 2002), *cert. denied*, 537 U.S. 1030, 123 S.Ct. 561, 154 L.Ed.2d 445, and *Bautista v. Star Cruises*, 396 F.3d 1289 (11th Cir. 2005), *cert. denied*, 125 S.Ct. 2954. *Francisco* and *Bautista* involved the same issue presented here—whether the domestic transportation worker exception to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, applies to seafarers whose government mandates arbitration of their employment disputes under international agreements subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention Act"), 9 U.S.C. § 201, *et seq.*

The Fifth and Eleventh Circuits, which encompass jurisdictions where the majority of international maritime disputes giving rise to this issue occur, agree that the FAA's domestic transportation worker exception does not apply to international agreements governed by the Convention Act. *Francisco, Bautista,* and *Lim, supra; see also Freudensprung v. Offshore Tec. Services, Inc.*, 379 F.3d 327 (5th Cir. 2004), and concurring district court opinions at *Acosta v. Norwegian Cruise Line, Ltd.*, 303 F. Supp. 2d 1327 (S.D.Fla. 2003); *Adolfo v. Carnival Corp.*, No. 02-23672, 2003 U.S. Dist. LEXIS 24143 (S.D.Fla. Mar. 17, 2003); *Jaranilla v. Megasea Mar., Ltd.*, No. 02-2048, 2002 U.S. Dist. LEXIS 16505 (E.D.La. 2002); *Amon v. Norwegian Cruise Lines, Ltd.*, No. 02-21025, 2002 U.S. Dist. LEXIS 27064 (S.D.Fla. Sept. 26, 2002). For the reasons set forth in both the Fifth and Eleventh Circuits' opinions, and as explained below, the Court again should decline to review this issue. Petitioners have failed to identify any conflict among federal court decisions, important question of federal law that should be

settled by this Court, departure from the accepted and usual course of judicial proceedings, or misapplication of a properly stated rule of law to justify such review. Supreme Court Rule 10. In fact, as shown below, no compelling reason for this Court's discretionary review exists.

2. Petitioners' FLSA Claims Are Subject to Arbitration, Unlike the Claims at Issue in the Distinguishable Case Relied Upon by Petitioners

Petitioners rely exclusively on one distinguishable case for the proposition that arbitration of their claims asserted in this case cannot be required. *See U.S. Bulk Carriers v. Arguelles,* 400 U.S. 351, 91 S.Ct. 409, 27 L.Ed.2d 456 (1971). The Fifth Circuit correctly concluded that *Arguelles* is inapplicable here. *Arguelles* involved the issue of wages due under a collective bargaining agreement and in accordance with 46 U.S.C. § 596 (now 46 U.S.C. § 10313). This case does not involve either a collective bargaining agreement or any claim for wages under 46 U.S.C. § 10313, but instead involves the attempt by foreign seamen working aboard foreign-flagged vessels to repudiate their solemn promises, namely the international arbitration agreements required and approved by their own government for their own benefit.

Further, contrary to Petitioners' assertion, this Court in *Arguelles* did not declare seamen's wages conclusively exempt from arbitration in all situations. Instead, this Court observed that a seaman "may, if he chooses, use the processes of grievance and arbitration." This Court also plainly stated "[w]e do not hold that § 596 is the exclusive remedy of the seaman." *Id.* at 356. Finally, as the Fifth Circuit previously has held and observed again in *Lim,* statutory claims, such as those brought under the FLSA, are arbitrable. *Lim,* 404 F.3d at 905, citing *Carter v. Countrywide Credit Indus., Inc.,* 362

F.3d 294, 297 (5th Cir. 2004); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991) and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). Nothing in the text or legislative history of the FLSA expressly precludes the arbitration of FLSA claims. *Id., citing Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319-20 (9th Cir. 1996) (finding no evidence that Congress intended to preclude arbitration of FLSA claims) and *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 506 (4th Cir. 2002) (holding that FLSA claims are arbitrable).

3. Strong Federal Public Policy and the Convention Act Mandate Enforcement of Petitioners' International Arbitration Agreements

Our country, Congress, and this Court have affirmed that international relations and trade depend upon parties to international transactions recognizing and enforcing their arbitration agreements. This affirmation has been expressed and codified by the United States through its accession to the international treaty known as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1958, by Congress' adoption of the treaty as part of our federal law at 9 U.S.C. § 201, *et seq.*, in 1970, and by this Court and other federal courts through case law such as *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-517, 41 L.Ed.2d 270, 94 S.Ct. 2449 (1974) ("A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction."), *Marinechance, Francisco, Lim,* and *Bautista, supra.*

The Convention Act on its face applies to every international arbitration agreement, such as the ones at issue in this case, "arising out of a legal relationship, whether contractual or not, which is commercial," except those entirely between citizens of the United States.[3] 9 U.S.C. § 202. Federal courts consistently have held that an arbitration agreement falls under the Convention Act if:

a. There is an agreement in writing to arbitrate the dispute;

b. The agreement provides for arbitration in the territory of a Convention signatory;

c. The agreement arises out of a commercial legal relationship; and

d. A party to the agreement is not an American citizen.

Francisco, 293 F.3d at 272-73; *Beiser v. Weyler*, 284 F.3d 665, 666 n. 2 (5th Cir. 2002); *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil,. Co. (Pemex)*, 767 F.2d 1140, 1144-45 (5th Cir. 1985). "If these requirements are met, the Convention **requires** district courts to order arbitration." *Francisco*, 293 F.3d at 273, citing *Sedco, Inc.*, 767 F.2d at 1144-45 (emphasis added).

Federal appellate courts that have addressed the issue consistently have held that arbitration agreements in

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[3] The Convention Act applies in some limited circumstances, not present in this case, to arbitration agreements between citizens of the United States. 9 U.S.C. § 202.

international POEA employment contracts such as those at issue in this case meet the Convention Act's requirements for enforceability. *Francisco*, 293 F.3d 270; *Marinechance*, 143 F.3d 216 (5th Cir. 1998); *Sedco, Inc.*, 767 F.2d 1140; *Bautista*, 396 F.3d 1289. For example, the district court in *Francisco* concluded that the employment contract itself, incorporating the Standard Terms, satisfied the writing requirement. *Id.*, 2001 U.S. Dist. LEXIS 3902, at *7-8 (E.D.La. Mar. 23, 2001). The court concluded that the provision for arbitration in the Philippines by an arbitrator accredited by the Philippine government satisfied the second requirement. *Id.*, at *8-9. The court also concluded that the employment contract was a commercial legal relationship and that the FAA's exclusion of employment contracts of seamen from the domestic arbitration laws does not apply to contracts covered by the Convention Act. *Id.*, at *9-11. Finally, finding that one of the parties to the agreement was not an American citizen, the court enforced the arbitration agreement and dismissed the suit. *Id.*, at *15. The Fifth Circuit correctly concluded that the international arbitration agreements at issue are governed by the Convention Act.

4. The Domestic Transportation Worker Exception to the FAA Does Not Apply to International Workers Whose Commercial Arbitration Agreements are Subject to the Convention Act

In enacting the Convention Act, Congress did not include or reference any exception to the enforceability of international arbitration agreements for domestic transportation workers, as it had previously and expressly done when enacting the FAA. *See* 9 U.S.C. § 202 and compare 9 U.S.C. § 1. Congress was certainly was aware of the existence of the domestic transportations workers' exception to the FAA at the time it enacted the Convention

Act, and its silence can be construed only as its express intention to give the Convention Act a broader scope. In fact, when drafting the Convention Act, Congress expressly referenced Section 2 of the FAA (bringing legal relationships that are "commercial" within the scope of that Chapter), but deliberately chose not to reference Section 1 of the FAA (excluding seamen's employment contracts from the commercial legal relationships within the scope of that Chapter). *Bautista,* 396 F.3d at 1298; *Francisco,* 293 F.3d at 275. This construction makes sense in the context of international commercial agreements, as compared to domestic commercial agreements, wherein the national policy favors the enforcement of the solemn promises of the parties with respect to forum selection and arbitration for the benefit of international relations and trade.

Congress contemplated and expressly addressed in the Convention Act the potential for conflict with the provisions of the FAA, giving the Convention Act "primacy" in its "field" and making the FAA applicable only residually if not in conflict with the Convention Act. *Bautista,* 396 F.3d at 1297 (noting that "'as an exercise of the Congress' treaty power and as federal law, 'the Convention must be enforced according to its terms over all prior inconsistent rules of law.'"), quoting *Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH,* 141 F.3d 1434, 1440 (11th Cir. 1998) and *Sedco,* 767 F.2d at 1145; 9 U.S.C. § 208. Because the Convention Act does not refer to or incorporate the domestic transportation worker exception in Section 1 of the FAA, they are in conflict and, thus, Section 1 of the FAA cannot apply residually.

Petitioners argue that the committee testimony of one State Department official establishes Congressional intent to support their view. Specifically, Petitioners contend that this

Court should be persuaded by the testimony of Ambassador Richard Kearney, Chairman of the Secretary of State's Advisory Committee on Private International Law, before the Senate Foreign Relations Committee, that Section 1 of the FAA sets forth this country's "national law" definition of legal relationships that are "commercial." Petitioners hope thereby to persuade the Court that Section 202 of the Convention Act is limited by Section 1 of the FAA. This argument fails. First, had Congress been persuaded by Ambassador Kearney's testimony, it certainly could have, and would have, referenced or incorporated Section 1 of the FAA in the Convention Act. Congress did not do so. Second, as the Eleventh Circuit in *Bautista* observed, while Ambassador Kearney's testimony may reflect that he personally believes Section 1 of the FAA to set forth the national law definition of commercial legal relationships, his belief as a single State Department official is "a relatively unreliable indicator of statutory intent," particularly in the face of such a clear and express statute. Finally, jurisprudence from this Court and other federal courts undermines any suggestion that Section 1 of the FAA reflects the national law definition of commercial legal relationships. Nothing in the FAA indicates that it occupies the entire field of arbitration. *Volt,* 489 U.S. at 477.

5. The Convention Act Preempts Louisiana Law Under the Supremacy Clause of the United States Constitution

Petitioners erroneously rely on this Court's decision in *M/S BREMEN v. Zapata Off-Shore Co.* for the proposition that their international arbitration agreements are not enforceable due to a Louisiana statute prohibiting forum selection clauses in employment contracts. 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972); Louisiana Revised Statute 23:921A (forum selection clauses in such contracts are

permitted under certain circumstances enumerated in the statute). Specifically, Petitioners argue that, under *M/S BREMEN,* arbitration agreements are "unreasonable" when "enforcement would contravene a strong public policy of the **forum** in which suit is brought, whether declared by statute or by judicial decision." *Id.*, 407 U.S. at 15 (emphasis added). The fallacy of Petitioners' argument is an incorrect assumption that the word "forum" as used in *M/S BREMEN* and as applied in the context of an international arbitration agreement subject to the Convention Act means a local rather than a national forum. The Fifth Circuit correctly observed, however, that when used in the international context, the relevant forum for the purpose of an *M/S BREMEN* reasonableness analysis is national, not local.

Petitioners' reliance on *M/S BREMEN* also is misplaced because Congress expressly defined in the Convention Act the relevant forum for the purpose of evaluating the enforceability of an international arbitration agreement subject to the Convention Act. Specifically, the Convention Act allows a court to refuse enforcement if "the recognition or enforcement of the award would be contrary to **the public policy of that country**." Convention, art. V, § 2(b) (9 U.S.C. § 207 makes the grounds for refusal or deferral of recognition and enforcement as set forth in the treaty applicable) (emphasis added). As the Fifth Circuit also observed, the Convention and its implementing legislation consistently refer to the forum at issue as national rather than local. 9 U.S.C. § 203 (giving federal courts jurisdiction over cases to which the Convention Act applies, regardless of amount in controversy); Convention, art. XI(a) (clarifying that the obligations of a signatory with a federal government are the same as those of a signatory that is a unitary state); 9 U.S.C. § 202 (defining United States corporate citizenship for the Act's purpose as being incorporated or having a principal place of business in

the United States, rather than defining citizenship based on incorporation or location of place of business in specific states within the United States). Further, the public policy reference in *M/S BREMEN* does not concern local matters because the case involved an international commercial agreement, and it is *dicta* insofar as this Court reversed the lower courts' decisions and ultimately enforced the forum selection provision based on strong federal public policy favoring same.[4]

Most important, any state law contrary to the Convention Act is preempted by the Supremacy Clause to the United States Constitution. U.S. Const., Article VI, cl. 2; *Volt Information Sciences, Inc. v. Board of Trustees,* 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989); *Southland Corp. v. Keating,* 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984); *OPE International LP v. Chet Morrison Contractors, Inc.,* 258 F.3d 443 (5th Cir. 2001); *Lejano v. Bandak,* 705 So.2d 158, 162 (La. 1997). Thus, the Fifth Circuit correctly held that the international arbitration agreements at issue fall under the Convention Act as a matter of law and must be enforced.

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[4] The facts and claims at issue in *M/S BREMEN* arose prior to the United States' 1970 enactment of the Convention Act based on the treaty. 407 U.S. 1 (citing *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955) and *Boyd v. Grand Trunk W.R. Co.*, 338 U.S. 263 (1949)). Obviously, these authorities cannot serve as a basis for refusing to enforce international arbitration agreements in light of the current strong federal public policy favoring enforcement of such agreements and the express provisions of the Convention Act affirming that policy.

Applying anti-arbitration laws of the State of Louisiana to invalidate an international arbitration agreement under the Convention Act "risks jeopardizing the United States' treaty obligations with 65 nations"[5] and achieves an absurd result. By doing so, the international agreements at issue in this case **would not be** enforceable under the Convention Act in federal court in Louisiana but **would be** enforceable under the Convention Act in federal court in any other state in this nation that does not have such an anti-arbitration law. **More important, if every state in this nation were to adopt an anti-arbitration law, this country's accession to the treaty would be rendered meaningless, as every international arbitration agreement would be unenforceable in any court, state or federal, in the United States.**

Disturbing the Fifth Circuit's decision would serve only to undermine the goals of the Convention Act by inviting and allowing a "parochial refusal by the courts of one country to enforce an international arbitration agreement" and "unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974), *rehearing denied,* 419 U.S. 885, 95 S.Ct. 157, 42 L.Ed.2d 129. Indeed, an overarching goal in adopting the Convention Act and favoring federal jurisdiction for deciding cases under the Convention Act is to promote "the development of a uniform body of law under the Convention"—a goal that cannot be achieved by applying the various laws of 50 individual states to international arbitration agreements. *Beiser*, 284 F.3d at 672-73. It is now well settled that federal law, not state law, governs the standard by which the enforceability of forum selection and arbitration provisions in

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[5] *Beiser*, 284 F. 3d 672.

admiralty and international agreements should be evaluated by federal courts. *Carnival Cruise Lines, Inc. v. Shute,* 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed. 2d 622 (1991), *Stewart Organization, Inc. v. Ricoh Corp.,* 487 U.S. 22, 108 S.Ct. 2239, 101 L.Ed.2d 22 (1988), *Scherk,* 417 U.S. at 511-12; *Archawski v. Hanioti,* 350 U.S. 532, 76 S.Ct. 617, 100 L.Ed. 676 (1956).

Thus, the Fifth Circuit correctly declined to apply Louisiana law to deviate from the strong federal public policy favoring the enforcement of international arbitration agreements and the Convention Act.

6. Conclusion

The Petition should be denied.

Respectfully submitted,

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